No. 83-924

In the Supreme Court of the United States

OCTOBER TERM, 1983

VIVIAN W. GALANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202)633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-924

VIVIAN W. GALANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the court of appeals abused its discretion in declining to certify a state tort law question to the Georgia Supreme Court.

1. The facts are not in dispute. Petitioner's decedent, Isaac N. Galanti, was killed while in the company of a key government witness whose life had been repeatedly threatened by a convicted felon, Michael G. Thevis. The witness, Roger Dean Underhill, who was also killed in the incident, was to testify against Thevis in an upcoming trial. Thevis was later convicted in connection with the deaths. Pet. App. 3-4, 22-23.

Prior to the killings, Underhill had been in frequent contact with Paul V. King, Jr., an FBI agent, concerning enrollment in the federal witness protection program. Underhill insisted upon completing certain personal

business, including the sale of a parcel of land in a secluded area of Fulton County, Georgia, before entering the program. Underhill had made frequent visits to the land, with King's knowledge and against King's advice, to try to sell it. Galanti and Underhill were killed while inspecting the land. On the night before the killings, Underhill told King that he intended to meet Galanti on the land to discuss a real estate transaction. King did not warn Galanti or take any steps to protect him. Pet. App. 3-5.

Petitioner brought suit in the United States District Court for the Northern District of Georgia under the Federal Tort Claims Act (FTCA), which provides for federal tort liability "where * * * a private person would be liable * * * in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The parties agree that Georgia law applies. The district court concluded that there existed no duty on the part of King under Georgia tort law to warn or protect Galanti under the circumstances of this case (Pet. App. 26). The court declined to find a general federal duty to warn or to compensate crime victims, citing this Court's "admonition that the [FTCA's] 'effect is to waive immunity from recognized causes of action and * * * not to visit the Government with novel and unprecedented liabilities.' " *Id.* at 28-29, quoting *Feres* v. *United States*, 340 U.S. 135, 142 (1950).

The court of appeals affirmed (Pet. App. 1-15). The general rule in Georgia, the court observed, is that a person has no duty to warn or protect another from a foreseeable risk of harm simply because of one's knowledge of the danger (*id.* at 8). It considered the three exceptions to that rule recognized under Georgia law: (1) a defendant's affirmative creation of the danger (*id.* at 9-12); (2) a defendant's ability to control the foreseeably dangerous actor (*id.* at 12-13); and (3) a defendant's voluntary assumption of a

duty to a specific individual (*id.* at 14). The court held that none of these exceptions applies to this case.

Petitioner then filed a petition for rehearing, with suggestion for rehearing en banc, asking for the first time that the question whether Georgia law would impose a duty on King be certified to the Georgia Supreme Court. The petition was denied without comment (Pet. App. 16-17).

2. Where applicable state law is genuinely in doubt, resort to state certification procedures "does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein,* 416 U.S. 386, 391 (1974). However, as this Court has held, "[i]ts use in a given case rests in the sound discretion of the federal court" (*ibid*). That discretion was not abused in this case. Three judges of the court of appeals and the district judge surveyed applicable precedents and encountered no difficulty in concluding that petitioner's attempt to expand the scope of the "duty to warn" is not in accord with the law in Georgia. The district court found it "clear" that King owed petitioner's decedent no duty to warn under the circumstances of this case (Pet. App. 27), and the court of appeals concluded that petitioner had not cited "*any* Georgia statute or case" supporting her position (*id.* at 14; emphasis added). Moreover, petitioner can hardly complain of the courts' failure to certify, since she failed to request such certification until after the court of appeals had rendered its decision.[1]

---

[1] Petitioner correctly points out (Pet. 29 n.2) that in *Lehman Brothers* certification was not requested until the petition for rehearing in the court of appeals. However, in *Lehman Brothers,* the petitioners had *prevailed* in the district court, which had rejected the respondents' proposed expansion of liability under state law. Only after the court of appeals adopted a construction that went well beyond then-existing state precedents did the petitioners have any reason to suppose that resort to state certification would be necessary. By contrast, petitioner

None of the special considerations making resort to state certification "particularly appropriate" in *Lehman Brothers* (416 U.S. at 391) is present here.[2] Unlike the federal court in New York struggling with unfamiliar Florida law in *Lehman Brothers*, the federal judges here were familiar with the state law to be applied and well able to evaluate whether certification was necessary or appropriate. Moreover, unlike the novel legal theory adopted by the federal court in *Lehman Brothers*, the principles governing this case were found by the courts to be clear and well-established. Petitioner cites no precedent from Georgia or any other jurisdiction recognizing a duty to warn under circumstances such as these (see Pet. 34). Thus, petitioner's assertion that her claim presents a close question of law warranting certification comes down to her hope that the "increasing[ly] liberal[]" Georgia Supreme Court would expand actionable tort duties (Pet. 38). But a plaintiff's hope for a change in state law is not sufficient to compel certification.

The other Supreme Court decisions cited by petitioner (Pet. 29-31) are beside the point. All reflect the "settled policy" of using certification to avoid unnecessary or premature constitutional decisions. *Mills* v. *Rogers*, 457 U.S.

---

here is the party urging a novel construction of state law, which construction was rejected by the district court. If petitioner wanted to give the Georgia courts an opportunity to accept her proposed expansion of tort liability she should not have waited until after the case had been decided against her by two federal courts.

[2]Petitioner apparently concedes that the legal standard used by the Eleventh Circuit to decide whether to certify a question of state law is correct. Pet. 27-29, citing *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266 (5th Cir.), cert. denied, 429 U.S. 829 (1976), and *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Thus, this case concerns merely the application of a concededly correct legal standard to this set of facts.

291 (1982); *Zant* v. *Stephens*, 456 U.S. 410 (1982); *Elkins* v. *Moreno*, 435 U.S. 647 (1978); *Bellotti* v. *Baird*, 428 U.S. 132 (1976). That policy has no application here, where no constitutional question is posed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

DOJ-1984-01